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NO. 88-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN O'CARROLL,
Petitioner

v.

AMERICAN AIRLINES, INC.,
Defendant,

CHAPARRAL AIRLINES, INC.,
Defendant/Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER FEDERALLY PRESCRIBED FLIGHT SAFETY STANDARDS FOR THE CONDUCT OF AIR CARRIERS PREEMPT A STATE LAW CLAIM FOR WRONGFUL EJECTION OF AN APPARENTLY INTOXICATED PASSENGER. 49 U.S.C.A. § 1301, *ET SEQ.* (*SEE ESPECIALLY:* 49 U.S.C.A. §§ 1305, 1511, and 1374; 14 C.F.R. 121.575.)

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Chaparral Airlines, Inc., prays that the Petition for Certiorari of Petitioner be denied and respectfully shows the following:

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

49 U.S.C.A. § 1305 provides in pertinent part as follows:

> (a) *PREEMPTION*
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C.A. § 1511 provides in pertinent part as follows:

> Subject to reasonable rules and regulations prescribed by the administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to the safety of flight.

14 C.F.R. § 121.575 provides in pertinent part as follows:

> *Section 121.575. Alcoholic Beverages*
>
> . . . .
>
> (c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.

STATEMENT OF THE CASE

This is a Texas common law negligence action brought by Melvin O'Carroll ("Petitioner") against Chaparral Airlines, Inc. ("Chaparral") for alleged wrongful exclusion from a flight. Petitioner was removed from the aircraft by police officers who had been called to render assistance when Petitioner refused to deplane at the request of the flight crew. Chaparral disagrees with Petitioner's version of the facts as described in Petitioner's summary of the record. *See* p. A-11, Petition for Writ of Certiorari. Instead, Chaparral submits that Petitioner was intoxicated and disorderly at the time of the incident in question, and that the evidence in this regard was overwhelming. *See* Respondent's Summary of the Record, *infra,* p. A-1.

A detailed review of the record will reveal the following: **(1)** All witnesses, even Petitioner, testified that he was intoxicated or appeared to be intoxicated (Tr 72, 123; Supp A-9, 20, 21, 44). Petitioner admitted that he "might could of appeared" drunk (Tr 72). **(2)** Petitioner and his cousin were described by various witnesses as loud, boisterous, obnoxious, abusive, disorderly, rowdy, and obscene (Tr 59, 123; Supp A-5, 16, 14, 20, 22, 32, 44). They could be heard by all the passengers, and were disturbing them (Supp A-28, 29, 35, 42, 43). **(3)** Several witnesses testified to the profane language used by the two men (Tr 50; Supp A-5, 15, 16, 20, 22, 26, 35, 42). Flight Attendant Morris stated "they were shouting obscenities at me" (Supp A 15) and were using a lot of G-damns and F-yous (Supp A 5). **(4)** All witnesses to the incident testified that they considered the presence of Petitioner and his cousin a threat to the safety of the flight (Tr 114, 120, 121, 122; Supp

A-4, 13, 30, 36, 46). (5) There was abundant testimony that Petitioner repeatedly refused to leave when asked by the Flight Attendant, the Ticket Agent, the Captain, and the Police (Tr 71, 83, 84, 87; Supp A-3, 5, 11, 21, 25, 45, 46, 47).

Chaparral was required by 14 C.F.R. § 121.575 ("Regulation 121.575") to refuse Petitioner passage, and had broad discretion to do so under 49 U.S.C.A. § 1511 ("§ 1511"). Since the allegedly negligent acts were required by Regulation 121.575 and sanctioned by § 1511, Petitioner's state law claims of negligence are preempted by these federal provisions. In addition, 49 U.S.C.A. § 1305 ("§ 1305") expressly preempts Petitioner's state law claims.

REASONS FOR DENYING THE WRIT

Petitioner merely reargues the merits of the appeal below and gives this Court no special or important reason for granting certiorari.

I. THE FIFTH CIRCUIT'S OPINION IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS.

Petitioner contends that the saving clause in 49 U.S.C.A. § 1506 preserves his state law claims despite the clear language of the subsequently enacted § 1305. In support of this argument, Petitioner cites this Court's opinion in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The opinion in *Nader* does not support Petitioner's position for several reasons.

In *Nader* there was no conflict between the state tort action and federal law. *Id.* at 299, 300. In fact, this Court stated in *Nader* that:

> The saving clause . . . cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act.

Id. at 299. In the instant case, the Fifth Circuit made it clear that its opinion was based in part on the inconsistency of Petitioner's state law negligence action with § 1511. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 12-13 (5th Cir. 1989). *See Adamsons v. American Airlines*, 457 N.Y.S.2d 771, 444 N.E.2d 21, 58 N.Y. 2d 42 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209 (1983) (court erred in submitting negligence to jury when § 1511 applied). *See also Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975).

In *Nader* there was no indication of express preemption. In fact, the concurring opinion of Justice White stated that:

> It may be that under its rule-making authority the Board would have the power to preempt recoveries under state . . . law. . . . But it has not done so, **at least as yet.**

Nader, 426 U.S. at 308 (emphasis added).

Subsequent to the decision in *Nader*, Congress enacted § 1305, providing the express preemption which, at the time of *Nader*, this Court recognized did not yet exist. In the instant case, the Court held that § 1305 was enacted by Congress well after § 1506 and is controlling. *O'Carroll*, 863 F.2d at 13 (on rehearing).

Since § 1305's enactment, only two circuits have considered its interaction with § 1506: the Fifth Circuit's opinion on rehearing in the instant case, and the Ninth

Circuit's opinion in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984) which held that § 1305 preempted a California statute, entitling blind persons to full and equal access to airplanes. Both *O'Carroll* and *Hingson* hold that § 1305 controls over § 1506, and no circuit has held to the contrary. In fact, the *Hingson* court cited *Nader* in support of its position:

> We are not persuaded by Hingson's reliance on 49 U.S.C. § 1506, which provides that '[n]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' *Id.* This section was enacted as § 1106 of the Federal Aviation Act of 1958, and was taken intact from a predecessor provision of the Civil Aeronautics Act of 1938. *See Klicker v. Northwest Airlines*, 563 F.2d 1310, 1314 (9th Cir. 1977); H.R. Rep. No. 2360, 85th Cong., 2d Sess. 18-19, *reprinted in* 1958 U.S. Code Cong. & Ad. News 3741, 3758.
>
> The legislative history of the Airline Deregulation Act of 1978 does not explain the relation between § 1506 and § 1305(a). A House report declares that § 1305(a) is intended to prevent conflicts and inconsistent regulations by preventing states from regulating routes, rates, or services of certain air carriers. H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3737, 3752. The actual language in § 1305(a) was adopted in preference to an earlier Senate version of the Airline Deregulation Act that prohibited states 'from enacting any law, establishing any standard determining rates, routes, schedules, or rates, fares or charges in tariffs of, or otherwise promulgating economic regulations for' certificated air carriers. *See* H.R. Rep. No. 1779, 95th Cong., 2d Sess. 94-95 (1978).

> Because California Civil Code § 54.1 would involve regulation of the services of an air carrier, we conclude that Hingson's claims under the state statute are preempted notwithstanding the savings clause in § 1506. ***Cf. Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S. Ct. 1978, 48 L.Ed.2d 643 (1976) (§ 1506 allows common law action for misrepresentation).**

Id. at 1416 n.11 (emphasis added).

The Fifth Circuit's decision is also consistent with the decisions of other circuits. In addition to the Ninth Circuit's opinion in *Hingson,* the District of Columbia Circuit has also held that § 1305 preempts state law claims for wrongful exclusion from airplanes. In *Anderson v. USAir, Inc.,* 818 F.2d 49 (D.C. Cir. 1987), a blind person sued an airline for refusing to seat him next to an emergency exit. Mr. Anderson continually refused to change seats, delayed the flight fifty-eight (58) minutes, and was eventually arrested and detained. In addition to other claims, Mr. Anderson alleged that the airline breached its state law "obligation as a public carrier to provide equal and courteous service to all." *Id.* at 1197.

The district court held that any state law obligation as a "common carrier" has been expressly preempted by § 1305. *See Anderson v. USAir,* 619 F. Supp. 4491 (D.C. D.C. 1985). The legislative history made it clear that the Act and regulations issued thereunder preempt state laws relating to air carrier services. *Id.* at 1198. Such services include the regulation of air-carrier seating policies for the handicapped. *Id.* The Court of Appeals agreed, and held that state law obligations of common carriers are expressly preempted by § 1305. 818 F.2d at 57.

Each of these cases, *Hingson, Anderson,* and *O'Carroll,* holds that § 1305 preempts state law actions against airlines relating to "rates, routes, or services," and that the term "services" encompasses an airline's decision to refuse transportation. None of these cases conflict with this Court's opinion in *Nader,* or the decisions of any other circuit. The Fifth, Ninth, and District of Columbia Circuits are in accord, and Petitioner's authority presents no conflict for this Court to resolve.[1]

II. THE FIFTH CIRCUIT'S HOLDING DOES NOT DEPRIVE ANY PLAINTIFF THE RIGHT TO PURSUE PERSONAL INJURY OR WRONGFUL DEATH CLAIMS AGAINST AIR CARRIERS.

Petitioner next attempts to persuade this Court that the Fifth Circuit's opinion in the instant case will deny compensation to those damaged as a result of fatal airline crashes. This is a patently overbroad and incorrect interpretation of the Fifth Circuit's opinion. The Ninth Circuit decided *Hingson v. Pacific Southwest Airlines, supra,* in 1984, and the District of Columbia Circuit decided *Anderson v. USAir, supra,* in 1987. Both of these holdings were nearly identical to that in the instant case, yet they

1. Petitioner cites six (6) additional cases: *Manfredonia v. American Airlines, Inc.,* 416 N.Y.S.2d 286 (Ct. App. 1979); *Lefkowitz v. Daro Chartours, Inc.,* 422 N.Y.S.2d 146 (Ct. App. 1979); *American Express Co. v. Teitel,* 464 N.Y.S.2d 947 (N.Y. Civ. Ct. 1983); *Brunwasser v. Trans World Airlines, Inc.,* 541 F. Supp. 1338 (W.D. Pa. 1982); *Porter v. Southeastern Aviation, Inc.,* 191 F. Supp. 42 (M.D. Tenn. 1961); and *In Re Air Crash Disaster,* 635 F.2d 67 (2d Cir. 1980). None of these cases addresses the conflict between state law actions for negligent removal and § 1511. None of these cases mention § 1305 or its effect on § 1506. As such, they are entirely distinguishable and do not conflict with the Fifth Circuit's opinion in this case.

have had no drastic effect on the continuing viability of wrongful death suits in mass disaster cases. As Petitioner has suggested, this Court can take judicial notice that the cases *In Re: Air Crash Disaster,* 767 F.2d 1151 (5th Cir. 1985), and *In Re: Air Crash,* 861 F.2d 814 (5th Cir. 1988), have been tried or are awaiting trial with no contention of preemption.

Petitioner argues that the Fifth Circuit's Opinion in this case would "wipe out state doctrines of common law negligence," and that if such a dramatic undertaking were intended by § 1305, the Legislative history would have mentioned it somewhere. *See Petition for Certiorari,* pp. 7-8. Even if Congress had intended such a dramatic undertaking, the Fifth Circuit's Opinion in the instant case does not present this Court with that question. Like the *Anderson* and *Hingson* opinions, *supra,* the Fifth Circuit's Opinion in this case merely concludes that the decision of a carrier to refuse transportation relates to "rates, routes or **services**," and Petitioner's claims are thus preempted by § 1305.

While Petitioner overstates the breadth of *O'Carroll,* the Fifth Circuit was clear to indicate that it relied heavily on the conflict of the state law negligence claims with § 1511 and the implied cause of action provided by 49 U.S.C.A. § 1374. *O'Carroll,* 863 F.2d at 12-13. The court below indicated that its reliance on § 1305 provided **additional** evidence of Congress' intent to preempt the types of claims asserted by Petitioner. The Court stated in pertinent part:

> While the pervasive breadth of the act as discerned from the language quoted above would tend to indicate Congressional preemptive intent, there is no

> need to rely upon inference **alone**, as § 1305 . . . expressly preempts state law. . . . In view of this explicit manifestation of Congressional intent, we conclude that **O'Carroll's** common law claims are preempted. . . .

863 F.2d at 13 (emphasis added).

Overall, Petitioner provides no authority or evidence to indicate that the lower court's opinion in this case is as broad and sweeping as Petitioner would suggest.

CONCLUSION AND PRAYER

Because the Fifth Circuit's Opinion in the instant case does not conflict with the decisions of this Court, or any other court, and since the lower court's holding does not seek to expand, or otherwise redefine the scope of § 1305, it does not present this Court with a significant or important issue to review. Respondent, Chaparral Airlines, Inc., prays that this Court deny O'Carroll's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I am a member of the United States Supreme Court Bar and counsel of record for Respondent herein and that, on the ____ day of April, 1989, three (3) copies of the above and foregoing Brief in Opposition were served on each party represented herein, pursuant to United States Supreme Court Rules 19 and 21, by depositing the same in the United States Post Office, Houston, Texas, with postage prepaid, certified mail, return receipt requested, and properly addressed to counsel of record for Petitioner, to-wit: MARCH H. COFFIELD, Seale, Stover, Coffield, Gatlin & Bisbey, Post Office Box 480, 950 North Wheeler, Jasper, Texas 75951.

WILLIAM L. MAYNARD

APPENDIX

SUMMARY OF THE RECORD*

Chaparral Airlines is a commuter airline supplying connecting service to American Airlines flights under the name "American Eagle." Melvin O'Carroll ("O'Carroll") was a temporary laborer, traveling home to Oakdale, Louisiana, from Portland, Maine, where he had been working at a paper mill (Tr 24).

After drinking at least one beer on his Portland to Boston flight (Tr 34), O'Carroll encountered his cousin, Robert Rollins, a life-long companion with whom he had prior occasion to drink (Tr 32, 68).

O'Carroll then consumed at least two beers while in Boston with his cousin (Tr 35), at least one beer on his Boston to Dallas flight, and at least another beer while in a bar at the Dallas-Fort Worth Airport (Tr 34, 35, 68, 69). At approximately 7:00 p.m., O'Carroll and his cousin boarded a Chaparral flight from Dallas to Alexandria, Louisiana. O'Carroll testified that, at the time of his boarding, he had consumed at least five beers (Tr 69); that his cousin had a "bottle of booze" on his person and appeared to be "a little intoxicated" (Tr 69); and that he himself "might could of appeared" drunk (Tr 72).

The two men entered the airplane and sat in the front row (Tr 38, 120) closest to the cockpit. On the Gulfstream G-1 59C aircraft, regulations require that the door separating the passengers from the cockpit be kept open

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* The use of (Tr), (Supp A), and (Supp B) refer this Court to the trial transcript and court-approved supplements thereto. The use of (Ptf) and (Def) refer this Court to Plaintiff's and Defendant's exhibit numbers.

during takeoff and landing, to provide passengers with access to emergency exits (Tr 114, 115; Supp A 7, 8, 9). During takeoff, the only flight attendant on the aircraft sits in the aft (rear) of the aircraft (Supp A 9), furthest away from the cockpit. The First Officer, Wayne Ramsey, and the Flight Attendant, James Morris, both testified that there was nothing—no door, no passengers, no flight attendant—separating O'Carroll and his cousin from direct access to the cockpit (Tr 114; Supp A 8, 9).

Immediately upon boarding and while the aircraft was still on the ground, O'Carroll and his cousin, apparently wishing to continue their drinking, both demanded drinks (Tr 39; Supp A 10, 14; Supp B 2), and O'Carroll's cousin told the pilot that he would "help him fly" the plane (Tr 39).

One passenger, Gary Yelm, a Chief Master Sergeant in the United States Air Force, was returning to his base in Alexandria and was seated close behind the two men (Supp A 19, 20, 21). Sergeant Yelm testified that, upon their boarding, he noticed the men "right away," and that they made him feel "uncomfortable" (Supp A 23). As it progressed, he became "frightened" (Supp A 24). He testified: "As the aircraft started to fill up there was two individuals that come on the aircraft talking very loudly, appeared to me to be intoxicated, they were using cuss words" (Supp A 20); "As loud as they were and the way they were acting, you know, kind of disturbed me because I thought maybe something was going to happen because to me, I don't know if I can say it again, they appeared to have been drinking" (Supp A 21).

After approximately five minutes (Supp A 24), just prior to closing the door (Supp A 2), one of the ticket

agents radioed to the aircraft that there was a problem with O'Carroll's ticket (Supp A 3). Flight Attendant Morris testified that he informed O'Carroll of the ticket problem and requested that O'Carroll "go upstairs and consult" with the gate agent (Supp A 3). O'Carroll refused to do so (Supp A 3). Upon arrival of the ticket agent who had been notified of his refusal, O'Carroll again refused to deplane (Supp A 3). Thereafter, upon request of both the Pilot-in-Command, Steve Ziegler, and First Officer Ramsey, O'Carroll still refused (Supp A 3, 4). At this point, Flight Attendant Morris noticed a flask-like bottle of liquor "sticking out of" O'Carroll's cousin's jacket (Supp A 3). Police book-in reports later revealed three bottles of liquor, one of which was already empty (Ptf 8; Def 21).

It was then discovered that O'Carroll's ticket, although printed incorrectly (thereby raising the question of its validity), was still valid (Supp A 3, 4). However, First Officer Ramsey testified that by that time "we had a more serious problem on our hands. Whether his ticket was good or bad didn't make any difference in this case" (Tr 129); "We have what we decided was an intoxicated passenger, unpredictable in actions, having easy access, unobstructed as to the cockpit during critical phases of the flight" (Tr 122). Flight Attendant Morris explained that dealing with this type passenger distracts the flight crew from carrying out its safety duties in the event of an emergency (Supp A 4, 13). First Officer Ramsey testified that the Federal Aviation Regulations "demand" the removal of passengers who appear to be intoxicated and that an airline and its pilots can lose their licenses for failing to remove such persons (Tr 115, 116, 117). Flight Attendant Morris testified that he was trained and tested on the

regulations, and that according to the regulations, O'Carroll was an unacceptable passenger (Supp A 16).

These same concerns and apprehensions carried through to the passengers as well. Sergeant Yelm testified that he did not want to take off with these two on the plane (Supp A 28), and that he thought the ticket problem was a ploy to get the two rowdy, intoxicated men off the airplane (Supp A 31, 32). As First Officer Ramsey indicated, the ticket question is, for all intents and purposes, irrelevant (Tr 129). Once having seen the apparent intoxication of these men, the flight crew was duty-bound to remove them from the aircraft.

After O'Carroll's repeated refusal (Tr 83, 84), Captain Ziegler contacted the Dallas-Fort Worth Airport Police, complaining of two "disorderly and intoxicated" passengers (Ptf 6, 8; Def 19, 21). Upon arrival of Police Officers Brandenburg and Savino, the Captain again asked the two men to deplane. However, even in the presence of the Police, they refused (Ptf 5, 6, 7, 8; Def 18, 19, 20, 21).

According to the reports and the testimony of Officer Brandenburg, O'Carroll's cousin stated that "it was a bunch of bullshit" and that he was "not going to get off" the "G-damn airplane" (Ptf 5, 6, 7, 8; Def 18, 19, 20, 21). The officers then asked both of the men to deplane (Supp A 27). They refused (Supp A 27).

At that point Sergeant Yelm heard one of the officers exclaim: "look out, that guy has got a knife" (Supp A 29). The arrest reports indicate that O'Carroll's cousin did have an open pocketknife on his seat and attempted to conceal it with his leg when officer Savino reached for it (Supp A 29, 36; Ptf 5, 6, 7, 8; Def 18, 19, 20, 21).

The officers seized the knife for their own safety and placed O'Carroll's cousin under arrest (Supp A 35). O'Carroll's cousin refused to leave and had to be forcibly removed from the aircraft (Supp A 35).

O'Carroll testified that he and his cousin were both mad and angry during the incident (Tr 66, 70, 71), that his cousin was making a "ruckus" (Tr 45), and that he himself "might have been disorderly" (Tr 59). Officer Savino testified that, at some point, O'Carroll said that "the f--king airline screwed up" his ticket and that he paid "for the G-damn thing" (Ptf 5, 6, 7, 8; Def 18, 19, 20, 21; Supp A 42). Officer Savino then arrested O'Carroll for disorderly conduct (Supp A 42). Having seen the removal of his cousin, O'Carroll left voluntarily (Supp A 46). According to O'Carroll, no one touched him and no physical force was used on him throughout the entire incident (Tr 72, 73).

Officer Savino testified that O'Carroll had an "intoxicating beverage odor" on his breath, blood-shot and watery eyes, and that he swayed a little when he stood and walked (Supp A 44). While O'Carroll may have been a little more quiet than his cousin, he was still loud, abusive, disorderly, and in violation of the penal code (Supp A 44).

Both O'Carroll and his cousin were transported to a local jail facility and booked (Ptf 5, 6, 7, 8; Def 18, 19, 20, 21). O'Carroll was released on bond the next day and returned to Alexandria on Chaparral, using his original ticket (Tr 59, 60, 61, 62).

The incident delayed the flight approximately 45 minutes (Tr Supp A 3, 30). However, the passengers

were appreciative of the time taken by the flight crew in dealing with the situation. Sergeant Yelm felt better after the two men were removed (Supp A 30, 31) and other passengers thanked Flight Attendant Morris for their removal (Supp A 6).

No one touched O'Carroll and absolutely no physical force was used to remove him (Tr 72, 73). O'Carroll himself testified that the flight crew was polite to him at all times (Tr 43, 46, 73, 74).